

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

SUSAN DWYER, as Personal Representative
of the Estate of William Dwyer, Deceased,

Plaintiff,

CENTERS FOR MEDICARE & MEDICAID
(Medicare Part A and Medicare Part B)

Involuntary Plaintiff,

vs.

BURNHAM LLC

Defendant.

Case No. _____

NOTICE OF REMOVAL

Defendant, BURNHAM LLC (“Burnham” or “Defendant”), pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, respectfully files this Notice of Removal of this action from the Circuit Court of Milwaukee County, Wisconsin to the United States District Court for the Eastern District of Wisconsin, Milwaukee Division. For the reasons set forth below, removal is proper based on 28 U.S.C. §§ 1332, 1441, and 1446.

INTRODUCTION

1. On September 21, 2021, Plaintiff Susan Dwyer (hereinafter referred to as Plaintiff), filed a Complaint in the State of Wisconsin Circuit Court of Milwaukee, Wisconsin styled *Susan Dwyer, Personal Representative of the Estate of William Dwyer, Deceased, v. Burnham LLC*, Case No. 2021 CV 0005815 (the “Complaint”).

2. Burnham was served with a copy of Plaintiff’s Complaint, the Summons, an Order Appointing Special Administrator, and an Affidavit on October 13, 2021. A copy of Plaintiff’s

Complaint, the Summons, and Order Dismissing Defendant K&L Heating and Air Conditioning Inc., by Plaintiffs' Counsel Frank T. Pasternak "Exhibit A".

3. Plaintiff's Complaint, the Summons, Order Dismissing Defendant K&L Heating and Air Conditioning Inc., by Plaintiffs' Counsel Frank T. Pasternak are the only pleadings, process, and/or orders that have been served on Defendant in this action to date.

4. Plaintiff alleges that Decedent was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers and/or asbestiform fibers emanating from certain asbestos products and/or asbestos-insulation equipment the Decedent was working with and around which were manufactured, sold, distributed (or otherwise placed into commerce), designed, packaged, removed, disturbed during maintenance activities, or installed by Burnham and K&L Heating and Air Conditioning, Inc. Exhibit A, Plaintiff's Complaint, ¶ 7.

5. Plaintiff's Complaint includes one count of negligence. Exhibit A, Plaintiff's Complaint.

6. Plaintiff dismissed K&L Heating and Air Conditioning Inc. in this matter on October 7, 2021. Exhibit A, Order Dismissing K& L Heating and Air Conditioning Inc., Only Without Prejudice.

DIVERSITY OF CITIZENSHIP

7. This is a civil action over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332 and is one that may be removed to this Court pursuant to 28 U.S.C. § 1441 because it is an action between citizens of different states.

8. Plaintiff, Susan Dwyer, is the Personal Representative of the Estate of William Dwyer and resides at 17500 St. James Road, Brookfield, WI 53045. Exhibit A, Plaintiff's Complaint.

9. Decedent was domiciled in Wisconsin at the time of his death and was a citizen of the State of Wisconsin. Exhibit A, Plaintiff's Complaint, ¶ 1.

10. Under 28 U.S.C. § 1332(c)(2), "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."

11. As Decedent was domiciled in Wisconsin at the time of his death, Plaintiff is also a citizen of Wisconsin. Exhibit A, Plaintiff's Complaint, ¶ 1.

12. Plaintiff have included the Centers for Medicare and Medicaid ("CMM" or "Involuntary Plaintiff") as an Involuntary Plaintiff for the purpose of claiming rights based on subrogation for the reimbursement of medical bills. Exhibit A, Plaintiff's Complaint, ¶ 3.

13. Upon information and belief, CMM's principle place of business is Maryland.

14. Defendant is incorporated in the State of Delaware with its principal place of business in Pennsylvania. Therefore, Burnham is a citizen of Delaware and Pennsylvania.

15. As such, Plaintiff, Involuntary Plaintiff, and Burnham are citizens of different states and there is complete diversity of citizenship present.

AMOUNT IN CONTROVERSY

16. Plaintiff does not allege a specific amount of damages sought in its Complaint, only stating on the cover of its Complaint that the amount claimed is over \$10,000 and that "the damages claimed in this action are in excess of that in Wis. State § 799.01(1)(d)". Exhibit A, Plaintiff's Complaint.

17. Within her Complaint, Plaintiff seeks monetary damages allegedly causing Decedent to suffer "injuries of a personal and pecuniary nature, including death" and money damages for interest, costs, disbursements, and attorneys' fees incurred herein.

18. The United States Supreme Court has held that the amount in controversy for jurisdictional purposes is measured by the direct pecuniary value of the right that the Plaintiff seeks to enforce or the value of the object that is the subject matter of the suit. *See Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 97 S.Ct 2434, 53 L. Ed. 1067 (1947).

19. Given the extent of the damages requested and the nature of the alleged injury, it is clear that the amount in controversy exceeds \$75,000.

20. Accordingly, the amount in controversy in the Complaint, exclusive of interest and costs, exceeds the \$75,000 jurisdictional minimum for federal diversity jurisdiction. *See* 28 U.S.C. § 1332(a).

28 U.S.C. § 1446'S REQUIREMENTS

21. A notice of removal may be filed within 30 days after the defendant receives a copy of the initial pleading, motion, or other paper from which it may be ascertained that the case is removable. 28 U.S.C. § 1446(b). Burnham was served with Plaintiff's Complaint on October 13, 2021. Exhibit A.

22. Therefore, this Notice of Removal, filed on or before November 12, 2021 is timely filed.

23. Venue is proper in this district under 28 U.S.C. § 1441(a) because the removed action was pending in this district and division.

24. Pursuant to 28 U.S.C. 1446(a), Burnham a "copy of all process, pleadings, and orders served upon Defendant" from the Milwaukee County action are filed herewith as Exhibit A.

25. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served on Plaintiff's Counsel and filed with the Clerk of the Circuit Court of Milwaukee County, State of Wisconsin, Case No. 2021-L-005815.

WHEREFORE, Defendant Burnham LLC hereby removes the above-referenced action now pending against it in the Circuit Court of Milwaukee County, Wisconsin to the United States District Court for the Eastern District of Wisconsin, Milwaukee Division.

Dated: November 12, 2021

Respectfully submitted,

CLYDE & CO US LLP

By: /s/ Daniel M. Pammer

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Pro Hac Vice to be filed

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, a copy of foregoing was filed electronically via the ECF filing system and was served on Plaintiffs' counsel by email and U.S. Mail upon the following:

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